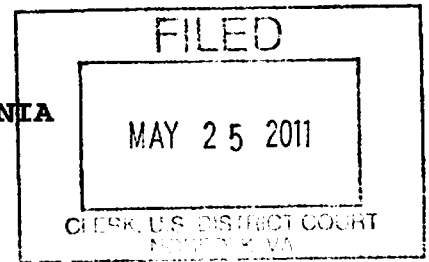


UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division



DAVID FRANKLIN,

Petitioner,

v.

Case No.: 2:10cv523

HAROLD W. CLARKE, Director of the
Virginia Department of Corrections,

Respondent.

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner was convicted of unlawful wounding and cutting in the commission of a felony on July 16, 2007. The petition alleges violations of federal rights due to the ineffective assistance of his trial counsel.

The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C), Rule 72(b) of the Federal Rules of Civil Procedure, and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia for report and recommendation. The report of the magistrate judge was filed on April 20, 2011, recommending that the petition be denied and dismissed. By copy of the report, each party was advised of his right to file written objections to the findings and recommendations made by

the magistrate judge. On May 5, 2011, the Court received the Petitioner's written objections. (ECF No. 21.) The Respondent filed no response to the Petitioner's objections.

The Petitioner first objects to the magistrate judge's conclusion that the three claims presented in the petition have not been fairly presented to the Virginia Supreme Court and review by this Court is precluded by the doctrine of procedural default. The magistrate judge found that Petitioner never presented the claim identified as Claim 3 to the Virginia Supreme Court and only presented Claims 1 and 2 in his petition for a rehearing of the Virginia Supreme Court's decision denying his state habeas petition.¹ Therefore, none of the claims have been fairly presented to the Virginia Supreme Court and the Petitioner is now unable to exhaust these claims in state court due to state procedural rules. The Court finds no reason to disturb any of the findings of the magistrate judge as to exhaustion and procedural default and OVERRULES Petitioner's objections to the report and recommendation involving those

¹ Petitioner cites his claim on direct appeal that the trial court erred in applying an unlawful presumption in convicting him of the charges against him. However, Petitioner's claim in the present petition is for ineffective assistance of counsel in failing to object to the trial court's use of an unlawful presumption. These are two very different claims and the presentation of one to the Virginia Supreme Court does not serve to exhaust the other.

issues.

Petitioner also objects to the magistrate judge's finding that Petitioner has failed to demonstrate cause and prejudice or a miscarriage of justice as required to obtain review of his claims despite their being procedurally defaulted. Petitioner's objections are merely a rehashing of his claims of ineffective assistance of counsel and do not address the specific findings made by the magistrate judge in rejecting Petitioner's case for an exception to the procedural default bar. The Court will not disturb the findings of the magistrate judge and hereby OVERRULES the Petitioner's objections.


The remainder of the Petitioner's written objections simply reiterate facts and arguments on the merits of his claims. Accordingly, the Petitioner's remaining objections are OVERRULED.

The Court, having reviewed the record de novo, does hereby ADOPT AND APPROVE the findings and recommendations set forth in the report of the United States Magistrate Judge filed on April 20, 2011 (ECF No. 20), and it is, therefore, ORDERED that the petition be DENIED AND DISMISSED WITH PREJUDICE for the reasons stated in the report. Adopting the recommendations in the magistrate judge's report, it is ORDERED that Respondent's Motion to Dismiss (ECF No. 8) be GRANTED and that Petitioner's

Motion for "Stay and Abeyance" (ECF No. 15) be DENIED. It is further ORDERED that judgment be entered in favor of Respondent.

Petitioner may appeal from the judgment entered pursuant to this final order by filing a written notice of appeal with the Clerk of this Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510, within thirty (30) days from the date of entry of such judgment. Petitioner has failed to demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Therefore, the Court, pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, declines to issue a certificate of appealability. See Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003).

The Clerk shall mail a copy of this Final Order to Petitioner and to counsel of record for Respondent.


_____/s/_____
Jerome B. Friedman
Senior United States District Judge
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

May 24, 2011